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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON GUZMAN,

Defendant and Appellant.

H045893

(Santa Clara County

Super. Ct. Nos. C1639438, C1516072,  
C1631859, C1639038)

**I. INTRODUCTION**

Defendant Aaron Guzman appeals after the trial court found him in violation of probation in case Nos. C1639438, C1516072, C1631859, and C1639038 based on: (1) his operation of a motor vehicle while under the influence of an alcoholic beverage; and (2) his possession or consumption of an alcoholic beverage. The court revoked defendant's probation and sentenced him to an aggregate term of five years eight months.

Defendant contends that the trial court's finding that he violated probation based on his possession or consumption of an alcoholic beverage must be set aside because the court did not order him to abstain from the possession or consumption of alcohol when it placed him on probation. Defendant asserts that the judgment must be reversed and the matter remanded for resentencing "because on this record it cannot be said that probation

would have been revoked based solely on the remaining allegation.” For reasons that we will explain, we will affirm the judgment.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. *Underlying Offenses, Convictions, and Sentence***

On June 18, 2015, defendant was found in possession of 45.4 grams of marijuana, 109 alprazolam (Xanax) pills, several bottles of codeine, LSD tabs, and three scales.<sup>1</sup> On October 27, 2016, in case No. C1516072, defendant pleaded no contest to possession of codeine for sale (Health and Saf. Code, § 11351; count 1) and possession of alprazolam for sale (Health and Saf. Code, § 11375, subd. (b)(1); count 2).

On August 2, 2015, defendant was observed throwing Xanax pills from a vehicle’s window as the vehicle was pursued by the police. Defendant’s cell phone contained text messages consistent with drug sales. On October 27, 2016, in case No. C1631859, defendant pleaded no contest to possession of alprazolam for sale (Health and Saf. Code, § 11375, subd. (b)(1); count 1) and misdemeanor destroying or concealing evidence (Pen. Code, § 135<sup>2</sup>; count 2).

On April 12, 2016, defendant was a passenger in a vehicle stopped by the police and was found in possession of Xanax, ecstasy, and items consistent with narcotics sales. On October 27, 2016, in case No. C1639438, defendant pleaded no contest to transportation of oxycodone for sale (Health & Saf. Code, § 11352, subd. (a); count 1), possession of oxycodone for sale (Health & Saf. Code, § 11351; count 2), transportation of codeine for sale (Health & Saf. Code, § 11352, subd. (a); count 3), possession of codeine for sale (Health & Saf. Code, § 11351; count 4), and possession of alprazolam for sale (Health & Saf. Code, § 11375, subd. (b)(1); count 5). Defendant also admitted

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<sup>1</sup> The facts of the four underlying cases are taken from the petition to modify defendant’s probation filed on June 1, 2017.

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise specified.

that he was out of custody on bail on two other felony offenses when he committed the crimes (§ 12022.1).

On May 5, 2016, defendant was arrested for being in possession of a 2006 Range Rover and 2011 Cadillac Escalade that had been reported stolen. On October 27, 2016, in case No. C1639038, defendant pleaded no contest to two counts of theft or unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a); counts 1-2), buying or receiving a stolen vehicle (§ 496d; count 3), misdemeanor petty theft (§§ 484-488; count 4), and misdemeanor buying or receiving stolen property (§ 496, subd. (a); count 5). Defendant also admitted that he was out of custody on bail on two other felony offenses when he committed the crimes (§ 12022.1).

On December 8, 2016, the trial court suspended imposition of sentence in the four cases and placed defendant on probation for five years. In case No. C1516072, defendant was ordered to serve one year in the county jail, which was credit for time served. Concurrent one-year county jail sentences were ordered in the remaining three cases. The court also orally ordered defendant not to knowingly possess or use any illegal drugs or drugs for which defendant did not have a prescription, not to knowingly possess any drug paraphernalia, and not to knowingly be present where any illegal drugs were located, among other probationary terms. The court's sentencing minutes in the four cases, which appear on preprinted forms, reflect the following probation conditions, among other terms: "No alcohol / drugs or where sold," and "Obey all laws."

**B. *June 1, 2017 Probation Violation Findings***

On June 1, 2017, the probation department filed a petition to modify the terms of defendant's probation. The petition alleged that defendant: committed misdemeanor infliction of corporal injury on a spouse (§ 273.5, subd. (a)) on March 30, 2017; failed to provide proof of a substance abuse program and an educational program or employment; used cocaine on several occasions; used alcohol on several occasions; and failed to register as a narcotics offender pursuant to Health and Safety Code section 11590. The

trial court granted the prosecution's motion to modify the petition to reflect that defendant was "arrested for" misdemeanor infliction of corporal injury on a spouse, and defendant admitted the allegations in the petition as modified. Defendant also waived all custody credits earned through April 12, 2017.

The trial court accepted defendant's admission and found him in violation of probation. The court reinstated defendant on probation with the "original terms and conditions," as modified to include one year in the county jail. After defendant agreed to comply with the terms and conditions of probation, the court stated, "Mr. Guzman, I want to tell you, you are looking at an extraordinary amount of time in state prison if you violate again. Do you understand that?" Defendant responded, "Yes, your honor."

**C. *March 26, 2018 Probation Violation Findings***

A contested probation violation hearing was held on March 26, 2018.<sup>3</sup> The following facts were elicited at the hearing.

Around 9:00 a.m. on October 22, 2017, Morgan Hill Police Officer Antonio Reis responded to a report of a reckless driver whom the caller had followed "from 101 through Morgan Hill into San Martin." Officer Reis pulled behind the suspect's vehicle as it exited a pumpkin patch in San Martin and contacted defendant, who was alone in the car.

Defendant stated that he had driven to the pumpkin patch from San Jose. Officer Reis observed that defendant had red, bloodshot eyes and a strong odor of alcohol on his breath. Officer Reis administered several field sobriety tests, which defendant failed. Officer Reis also conducted two in-field breath tests with a preliminary alcohol screening device. The result of the first test indicated that defendant had a blood alcohol

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<sup>3</sup> The record on appeal does not include a petition for the modification of defendant's probation based on his October 22, 2017 probation violation. The trial court's minutes reflect that defendant was arraigned on the "VOP" on November 16, 2017, his probation was revoked in all four matters, and he was remanded into custody without bail.

level of 0.164 percent; the second test indicated a blood alcohol level of 0.159 percent. Defendant told the officer that he had consumed half a bottle of brandy, but had stopped drinking at 1:00 a.m. After defendant was arrested, two breath tests were administered at the police department. Both tests registered that defendant had a blood alcohol level of 0.13 percent.

At the conclusion of the hearing, the trial court found defendant in violation of probation for operating a motor vehicle while under the influence of an alcoholic beverage and for possessing or consuming an alcoholic beverage.

Before imposing sentence, the trial court stated: “Counsel, I do feel very strongly as you do that your client is in great need of substance abuse treatment. [¶] However, I also cannot overlook the fact that since December 9 of 2016, and in fact for the six months preceding that date when he was in custody, he’s had numerous opportunities to participate in treatment. Most importantly, he was ordered to participate in treatment. . . . And yet he has not taken advantage of any of that treatment. [¶] And in fact as the district attorney has pointed out, [he] has consistently committed new crimes. Even after the grant of probation in this case, which was done in all four cases at the same time, he was ordered to serve a year concurrent in all of those cases at the same time, the defendant was released from custody, and instead of participating in treatment, participating in the referrals given to him by probation, registering as he was ordered under [Health and Safety Code section] 11590, he went out and committed a new violation less than three months after his release from custody, one that was in fact alcohol related. [¶] He was given an additional chance at probation at that time. And in June 2017, he was returned to custody on that violation of probation. And when released on . . . October 12 of 2017, 10 days later he committed a new offense. [¶] And . . . this court has no indication he benefitted or participated in any form of treatment during that time. [¶] And I think it was made very clear to the defendant at the last violation that he’s got to do this. But that wasn’t enough. And now since the court has indicated its

intention to impose a state prison sentence if the defendant is found in violation, for the first time he's begun doing some work while in custody. [¶] But I'm extremely concerned about public safety in this case. Virtually every one of the defendant's even more serious offenses have involved the use of alcohol and/or illegal controlled substances and not in small quantities. And theft of valuable vehicles. And . . . two full years in county jail and . . . almost two years on probation have not influenced him at all. [¶] And so for all of those reasons, I find that defendant is not benefitting from probation supervision. . . . [A]t this point, the interests in the preservation of public safety and property and in the notion that at some point there has to be accountability, I do intend to impose [a] state prison term . . . .”

In case No. C1639438, the trial court imposed a three-year term on count 1 for defendant's violation of Health and Safety Code section 11352, subdivision (a); a concurrent three-year term on count 3, which was also for a violation of Health and Safety Code section 11352, subdivision (a); and a concurrent two-year term on count 5 for defendant's violation of Health and Safety Code section 11357, subdivision (b)(1). The court also imposed a consecutive two-year sentence for one of the out-on-bail enhancements under section 12022.1. The court stayed the imposition of sentence on counts 2 and 4 and struck the punishment on the second out-on-bail enhancement.

In case No. C1639038, the trial court imposed a consecutive eight-month term on count 1, which was one-third of the midterm, for defendant's violation of Vehicle Code section 10851, subdivision (a) and concurrent two-year terms on counts 2 and 3 for defendant's violation of Vehicle Code section 10851, subdivision (a) and section 496, subdivision (b). The court denied probation on counts 4 and 5 for defendant's misdemeanor violations of sections 484/488 and section 496, subdivision (a). The court struck the punishment on the out-on-bail enhancements.

In case No. C1631859, the trial court imposed a concurrent two-year term on count 1 for defendant's violation of Health and Safety Code section 11375,

subdivision (b)(1) and denied probation on count 2 for defendant's misdemeanor violation of section 135.

In case No. C1516072, the trial court imposed a concurrent three-year term on count 1 for defendant's violation of Health and Safety Code section 11351 and a concurrent two-year term on count 2 for defendant's violation of Health and Safety Code section 11357, subdivision (b)(1).

The total aggregate term imposed was five years eight months.

### **III. DISCUSSION**

#### **A. *March 26, 2018 Probation Violation Finding***

Defendant contends that the trial court's finding that he violated probation based on his possession or consumption of an alcoholic beverage must be set aside because the court did not impose a "no alcohol" condition as a term of defendant's probation.

Defendant acknowledges that the no-alcohol condition appears in the court's sentencing minutes, but argues that "[t]he oral pronouncement of sentence prevails over the court minutes."

The Attorney General counters that defendant's claim has been forfeited because he failed to object to the trial court's finding. The Attorney General also contends that defendant has failed to demonstrate that he was not subject to the no-alcohol condition because: (1) the oral pronouncement of sentence does not always control when there is a discrepancy between the transcript of the court's oral pronouncement and the court's sentencing minutes; (2) there is no requirement that probation conditions be orally imposed; and (3) defendant was on notice of the no-alcohol condition no later than June 1, 2017, when he was found in violation of probation based, in part, on his admission that he had consumed alcohol.<sup>4</sup>

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<sup>4</sup> As we stated above, defendant also admitted that he: was arrested for misdemeanor infliction of corporal injury on a spouse (§ 273.5, subd. (a)); failed to provide proof of a substance abuse program and an educational program or employment;

Although defendant argues that where there is a discrepancy between the court's minutes and the reporter's transcript of the proceedings, the transcript prevails, the California Supreme Court has rejected "such a mechanical rule." (*People v. Smith* (1983) 33 Cal.3d 596, 599 (*Smith*).) Rather, " 'when, as in this case, the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation]. Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case.' [Citations.]" (*Ibid.*)

Here, for several reasons, we determine that the reporter's transcript of the trial court's oral imposition of probationary terms on December 8, 2016 "is entitled to greater credence" and therefore prevails. (*Smith, supra*, 33 Cal.3d at p. 599.) In each of the four cases, the reporter's transcript reflects that the trial court orally imposed the probationary terms recommended by the probation department in its presentence report and did not deviate from the department's recommendations. The probation department recommended the imposition of several probation conditions regarding illegal drugs, but did not recommend a no-alcohol condition. When the trial court orally imposed the probationary terms and conditions, it ordered defendant not to knowingly possess or use illegal drugs, but it did not mention alcohol. The no-alcohol condition appears solely on the clerk's sentencing minutes, where a box is checked on a preprinted form next to the condition: "No alcohol / drugs or where sold." Given that the trial court orally imposed the terms recommended by the probation department, which did not recommend a no-alcohol condition, and the no-alcohol condition appears solely on the clerk's preprinted

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used cocaine on several occasions; and failed to register as a narcotics offender pursuant to Health and Safety Code section 11590. Defendant did not appeal the trial court's June 1, 2017 probation violation findings.



form that combines no alcohol and no drugs, we conclude that the reporter's transcript of the trial court's oral imposition of probationary terms controls.

Because we have determined that the reporter's transcript of the trial court's oral imposition of probationary terms controls, we must also conclude that the trial court did not impose a no-alcohol condition when it placed defendant on probation on December 8, 2016. Although the trial court ordered defendant to abstain from illegal drugs, it did not order him to abstain from the possession or consumption of alcohol. Nor did the trial court impose a no-alcohol condition as a probationary term when it found defendant in violation of probation on June 1, 2017, because the court revoked and reinstated defendant's probation "on [the] original terms and conditions." Thus, we conclude that defendant's probation did not include a no-alcohol term when the trial court found him in violation of probation on March 26, 2018, for operating a motor vehicle while under the influence of an alcoholic beverage and for possessing or consuming alcohol.<sup>5</sup>

The Attorney General argues that there is no requirement that probation conditions be orally imposed and that a trial court need not spell out the probationary terms in great detail as long as the defendant knows what they are. However, the issue here is not notice to defendant; it is whether the trial court ever imposed a no-alcohol condition at all. A nonimposed—and thus, nonexistent—probation condition cannot be the basis for a probation violation finding, whether defendant thinks the condition exists or not.

For these reasons, we conclude that the trial court could not properly find defendant in violation of probation for possessing or consuming alcohol.<sup>6</sup>

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<sup>5</sup> We note that the judge who found defendant in violation of probation on June 1, 2017 and March 26, 2018 was not the same judge who placed defendant on probation on December 8, 2016.

<sup>6</sup> Although we would otherwise order the clerk to strike the trial court's March 26, 2018 finding that defendant violated his probation based on his possession or consumption of an alcoholic beverage, that finding does not appear in the clerk's transcript, which simply indicates, "Court finds VOP."

The only ground remaining to support the revocation, defendant's failure to obey all laws by driving a motor vehicle while under the influence of an alcoholic beverage, is not challenged by defendant. Although defendant accurately observes that the condition that he obey all laws also was not orally imposed by the trial court on December 8, 2016, he concedes that the condition was implicit based on section 1203.2, subdivision (a), which provides that a trial court "may revoke and terminate the supervision of the person if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the person . . . has subsequently committed other offenses, regardless of whether he or she has been prosecuted for those offenses." (See *People v. Thrash* (1978) 80 Cal.App.3d 898, 902 ["The proscription against criminal conduct is so basic it is a condition of probation even if it is not expressly set forth in the order"]; see also *People v. Arreola* (1994) 7 Cal.4th 1144, 1149 (*Arreola*) [recognizing "the implicit condition that [the defendant] not violate the law"]; *People v. Hall* (2017) 2 Cal.5th 494, 502 [stating that "one of the most common probation conditions [is] the implicit condition to obey all laws"].) Thus, the additional, unchallenged ground of failing to obey all laws by driving under the influence of an alcoholic beverage is enough to support the trial court's decision to revoke defendant's probation and sentence him to prison. (See *Arreola*, *supra*, at p. 1161 [observing that substantial evidence of numerous probation violations, apart from the probation violation supported by erroneously admitted evidence, justified revocation of defendant's probation].)

**B. Request for Remand**

Defendant contends that the judgment must be reversed and the matter remanded for resentencing "because on this record it cannot be said that probation would have been revoked based solely on the remaining allegation." Citing *In re Babak S.* (1993) 18 Cal.App.4th 1077 (*Babak S.*) and *People v. Self* (1991) 233 Cal.App.3d 414 (*Self*), defendant argues that this court should remand the matter for resentencing so that the trial

court may consider “the fairness” of revoking probation based on a term—the condition that defendant obey all laws—that was not explicitly imposed.

In *Babak S.*, the juvenile court committed the minor to the California Youth Authority after it found that the minor had violated probation by living in the United States with his parents when he had been ordered to live in Iran for two years and by failing to report to his probation officer. (*Babak S.*, *supra*, 18 Cal.App.4th at pp. 1082-1083.) The juvenile court also heard evidence that the minor had associated with a known probationer. (*Ibid.*) On appeal, a panel from this court concluded that the probation condition requiring the minor to live in Iran was invalid and that the juvenile court improperly found that the minor had failed to report to his probation officer. (*Id.* at pp. 1084-1086.) This court concluded, “Though the [juvenile] court might have found the previous dispositional order ineffective based only upon the minor’s violation of the probationer/gang condition, we cannot conclude on this record that the court would have imposed a Youth Authority commitment based solely upon Babak’s association with” the probationer, and remanded the case for further proceedings consistent with the decision. (*Id.* at pp. 1089, 1091.)

In *Self*, a defendant convicted of writing checks with insufficient funds was found in violation of probation based on her failure to regularly report, her failure to pay restitution, and her possession of a checking account. (*Self*, *supra*, 233 Cal.App.3d at pp. 415-416.) The Court of Appeal held that the trial court’s finding that the defendant had failed to pay restitution was invalid because the court did not state its reasoning when making this determination. (*Id.* at pp. 417-419.) The court further held that the trial court’s finding that the defendant had violated probation by possessing a checking account was invalid because the trial court permitted the prosecution to amend the probation violation petition to allege this violation without giving the defendant notice and an opportunity to be heard. (*Id.* at p. 419.) The appellate court concluded that based on the record before it, it could not determine that the trial court would have sentenced

defendant to state prison based solely on her failure to report, and remanded the matter for resentencing. (*Ibid.*)

Unlike in *Babak S.* and *Self*, the record in this case allows us to conclude that the trial court would have sentenced defendant to state prison based solely on his failure to obey all laws by driving under the influence of an alcoholic beverage. When the trial court revoked defendant's probation and sentenced him to prison, the court observed that three months after defendant was granted probation, he was arrested for inflicting corporal injury on a spouse. Defendant also admitted that he had used cocaine on several occasions, had failed to provide proof of his participation in a substance abuse program, and had failed to register as a narcotics offender. When he was sentenced on those violations, the trial court warned that he "was looking at an extraordinary amount of time in state prison if [he] violate[d] again." The trial court gave him "an additional chance at probation," but he reoffended just 10 days after his release from custody when he drove under the influence. The trial court "ha[d] no indication [defendant] benefitted or participated in any form of treatment during that time." The trial court stated that it was "extremely concerned about public safety in this case," and concluded that "two full years in county jail and . . . almost two years on probation ha[d] not influenced [defendant] at all." The court found that "defendant [was] not benefitting from probation supervision" and that "the interests in the preservation of public safety and property and in the notion that at some point there has to be accountability" necessitated a state prison term.

On this record, we determine that the trial court would have revoked defendant's probation and imposed a state prison sentence based on the remaining violation—defendant's failure to obey all laws by driving under the influence of an alcoholic beverage—alone. As a result, we conclude that the trial court's invalid finding that defendant violated his probation based on his possession or consumption of an alcoholic

beverage was harmless. (See *People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Lawson* (1999) 69 Cal.App.4th 29, 35, fn. 5.)

#### **IV. CONCLUSION**

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

*People v. Guzman*  
H045893